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JAMES R. BROWN

Supreme Court of the United States

REPLY MEMORANDUM

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 279

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Petitioner*

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY MEMORANDUM

While the correctness of the decision below and the extent to which it conflicts with prior decisions are properly matters for argument, the administrative position that the Government has consistently taken for over thirty years with respect to prepayment charges should be a matter of fact. Petitioner believes that the Government's Brief in Opposition (Footnote 4, page 8) is inexcusably misleading in this respect.

Treasury Regulations 62, promulgated under the Revenue Act of 1921, through Treasury Regulations 77, promulgated under the Revenue Act of 1932, continuously defined the gross income of life insurance companies, *i.e.*, "interest, dividends and rents," as being comprised only of "items 25-34" of the "Income Page of the Annual Statement for Life Companies (Edition of 1920)." If these "items" did not include prepayment charges as interest—and the Government knows that they did not—a generation of Treasury practice based on such Regulations cannot be disregarded as mere "inaction." (Gov. Br. p. 8).

The Government would relegate its own Regulations to obscurity by reading them not in terms of the 1920 Edition of the Income Page, to which explicit reference is made in the Regulations, but rather in terms of another edition of the Income Page, which is nowhere mentioned in the Regulations (Footnote 4, page 8). The Government creates confusion out of the fact that the numbering of the income items in the Bulletin "H" Edition of the Income Page does not coincide by one with that contained in the 1920 Edition of the Income Page and referred to in the Regulations. A casual comparison of the two editions, which are attached and which were available to Government counsel, makes clear that the difference is quite immaterial.

The difference in numbering is due solely to the addition in the 1920 Edition of a new item numbered 6 relating to disability premiums, which are not involved here. This item did not appear in the Bulletin "H" Edition. Items 25-34 of the 1920 Edition correspond precisely with Items 24-33 of the Bulletin "H" Edition; Item 36 of the 1920 Edition and Item 35 of the

Bulletin "H" Edition have exactly the same heading, "[Income] From Other Sources (give items and amounts)"; and Bulletin "H" specifically states that prepayment charges are among the items to be reported under this heading.

The language used in Article 671 of Treasury Regulations 62 is too exact to succumb to the Government's unwarranted attempt to render it meaningless. The fact is that in Bulletin "H" the Government ruled that prepayment charges were not included in those items denominated "interest" but were, rather, included only as "income from other sources." Then, for over a decade the Treasury Regulations stated that the gross income of a life insurance company was "comprised of Items 25-34, inclusive", of the Income Page from the 1920 Edition which items related only to "interest, dividends and rents." Thus, contrary to the Government's belated assertion, they comprehended Item 25—"Gross interest on mortgage loans" through Item 34—"Gross rent from company's property" just as they clearly excluded income "From Other Sources," which was defined in Bulletin "H" as including prepayment charges. This official position was repromulgated for over a decade, and thirty years of administrative practice have been based upon it.

What the Government has done here, and what the court below has condoned, is precisely what this Court has condemned in a series of cases culminating in *United States* v. *Leslie Salt Co.*, 350 U.S. 383—to substitute a recent *ad hoc* contention for "the Treasury's

prior long-standing and consistent administrative interpretation . . . ."

Respectfully submitted,

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